FOR ARGUMENT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

NO. 79-6777

GARY KEITH STEAGALD,

Petitioner

V.

UNITED STATES OF AMERICA,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

JOHN RICHARD YOUNG
Suite 504
44 Broad Street, N.W.
Atlanta, Georgia 30303

Court-appointed counsel
for Petitioner

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REPLY BRIEF FOR PETITIONER

I. STANDING

The government has raised for the first time in the three year history of this litigation the issue of whether Petitioner had a reasonable expectation of privacy in the Cary Court premises where the search in question occurred. Petitioner's response thereto will be brief.

First, he contends that he did have such an expectation as the government itself contended in its Brief in Opposition at page 3, notwithstanding the new contention in the government's brief on the merits that such a conclusion was "mistakened". (Brief of the United States 17, n. 8)

Second, Petitioner believes that the standing argument was long ago waived by the government in the courts below and in its Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit inasmuch as it was never raised.

To suggest that because the "automatic standing" rule of Jones v. United States, 362 U.S. 257 (1960) was in force during the litigation below, the government never had an opportunity to raise the standing issue, flies in the face of the very decision upon which the government relies, to wit: United States v. Salvucci, No. 79-244 (June 25, 1980), decided nearly three months prior to the filing of the government's Brief in Opposition to the Petition for Writ of Certiorari. In Salvucci, supra, the government raised at the district

court level its contention that the the defendant therein had no legitimate expectation of privacy in the premises searched, and therefore, no standing to attack the validity of the search warrant pursuant to which the search was conducted. The government made its argument in Salvucci, despite the existence of Jones v. United States, supra, which Salvucci later, of course, overruled.

Of course, to make its most recent standing argument to the trial court, the government here would have had no little difficulty inasmuch as such an argument would have been rather inconsistent with its desire to connect Petitioner to the premises searched in order to prevail on the merits in its possession count of the indictment.

Petitioner contends that the government should not be permitted to profit by the absence of Salvucci in the trial on the merits, and the presence of Salvucci in this Court.

II. THE PAYTON NON-RETROACTIVITY ARGUMENT.

Petitioner must candidly concede that his argument on the merits in the Brief for Petitioner appears to urge a finding that the holding in Payton v. New York, 445 U.S. 573 (1980) be applied retroactively. This, however, is not his position. Instead, he believes that such a finding is unnecessary in order for him to prevail, but does contend that to the large extent to which Payton relied upon previous decisions of this Court, it is instructive. Petitioner contends that the clear language of the Fourth Amendment and the cases he cited in his first brief mandate the holding, independent of Payton, that the police must secure a search warrant before executing an arrest warrant at the residence of a citizen not named in the arrest warrant, and in the absence of exigent circumstances or consent. Otherwise, there is simply no way to protect the privacy of such citizens from the unfettered discretion of the government authorities.

III. THE "GOOD FAITH" ARGUMENT.

Assuming that the Constitution requires adherence to Petitioner's contentions, Petitioner is entitled to the benefit of this Court's decision, despite the Government's assertion that the agents' good faith belief in the constitutionality of their actions vitiated the later-determined constitutional violation.

As a matter of federal constitutional law, illegally obtained evidence must be excluded from the trial of a criminal defendant whose rights were transgressed during the search that resulted in acquisition of the evidence. Mapp v. Ohio, 367 U.S. 643 (1961); Stone v. Powell, 428 U.S. 465, 535 (1976) (Brennan, J., dissenting).

However, to apply the government's assertions regarding good faith of the searching officers to this case would both circumvent over sixty years of Fourth Amendment precedent, as well as freeze Fourth Amendment law in its present form by destroying the reason for criminal defendants to assert their rights.

In Stovall v. Denno, 388 U.S. 293 (1967), where it was held that the decisions in Wade v. United States, 388 U.S. 218 (1967) and Gilbert v. United States, 388 U.S. 263 (1967), would not be given retroactive effect, the Court discussed the apparent inequity among criminal litigants whose constitutional rights are at issue before the Supreme Court:

> "We recognize that Wade and Gilbert are, therefore, the only victims of pretrial confrontations in the absence of their counsel to have the benefit of the rules establised in their cases. That they must be given that benefit is, however, an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum. Sound policies of

> decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies, and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law, militate against denying Wade and Gilbert the benefit of today's decisions. 388 U.S. at 301 (emphasis supplied).

This has been cited affirmatively by this Court at least twice. United States v. Peltier, 422 U.S. 531, 542, n. 12 (1975); Bowen v. United States, 422 U.S. 916, 920 (1975).

The reasoning of Stovall is nowhere clearer or more applicable than in Petitioner's case. First, to deny Petitioner the benefit of the exclusionary rule for the constitutional violation as occurred here would mean that Petitioner had been deprived despite his use of the judicial system, undertaken pursuant to his good-faith and his correct interpretation of the Constitution. Michigan v. Defillippo, 443 U.S. 31, 99 S.Ct., at 2635, n. 1 (Brennan, J., dissenting). The need for a search warrant in cases such as this one would be mere advisory language to law enforcment officials until such time that it could be established that the officers in the field reasonably knew, or should have known, about this controlling "precedent" and its appropriate application.

Second, a ruling whose effect would be to deny a remedy to a criminal litigant similarly situated to petitioner would in fact bar appellate review of that class of cases. Once a constitutional violation is found by the trial court, followed by a finding of good-faith enforcement practice by the police, the matter is thereby closed. The government would not appeal, because the illegally seized evidence would be nontheless admitted. The accused's appellate rights are almost negligible,

since no alternative remedy is available in that criminal matter, and the burden of overcoming a trial court's factual finding of good faith nearly insurmountable.

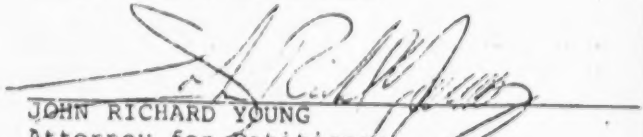
Thirdly, and paramount to this issue, is the severe effect that a denial of the decision's benefit to the criminal defendant who raised the issue would have upon all future criminal litigants. Outside of the illusory benefit of delay, it must be undisputed that a criminal defendant would not appeal to a reviewing court if he knows that, whether his contentions are proved right or wrong, the result is exactly the same. Not only does this render appellate decisions advisory, in that their holdings would apply only to subsequent cases, but it most certainly would demolish any incentive for an attorney to pursue such a costly and timely avenue merely to hit a definite deadend. Ironically, only those defendants with appointed counsel are likely to receive the determined, steady advocacy that flows from litigation more likely to produce "lawyers',"- but not "clients',"- victories.

Cases such as this one, encompassing both good faith and the issue of whether the litigant is to be benefitted by the decision in his case, raise the future issue as to when prospective application of the new doctrine would apply. Fourth Amendment cases are generally given prospective application only, with retroactivity gauged by Stovall v. Denno, supra. If Petitioner is denied the benefit of the new doctrine that his case created, then when is that holding deemed part of existing law enforcement practice? If it is determined to be the day of the decision, then would an officer in the field who, through no fault of his own, failed to receive the latest information (presumably from the police legal advisor) on permissible searches, be entitled to justify a constitutional violation due to good faith reliance upon the older, but actually overruled case

law? Is knowledge of the constitutional requirements imputed to the arresting or searching officer on the day after the decision? A week after? A month? To deny the benefit of the decision to the litigant who either perservered or was fortunate to have his case heard after other cases with identical facts is fraught with these difficulties. United States v. Peltier, supra, 422 U.S. at 543 (Douglas, J., Dissenting).

In some cases, "society's interests may be outweighed by the need to provide an effective sanction to a constitutional right". Michigan v. Tucker, 417 U.S. 433, 447 (1974), citing Weeks v. United States, 232 U.S. 383 (1914). The application of the good faith doctrine to this case will destroy the incentive of criminal defendants to vindicate infringements upon their Fourth Amendment rights. Clearly, the consequences of such an effect would be to stagnate an area of the law that until now had remained sufficiently flexible to meet the needs of our changing democratic society.

Respectfully submitted,



JOHN RICHARD YOUNG
Attorney for Petitioner

Suite 504
44 Broad Street, N.W.
Atlanta, Georgia 30303

(404) 522-0400

CERTIFICATE OF SERVICE

This is to certify that I have this date served the opposing counsel, Mr. Wade H. McCree, Jr., Solicitor General of the United States, Department of Justice, Washington, D.C. 30530, with a copy of the within and foregoing Reply Brief for Petitioner, by depositing same in the United States Mail in a properly addressed envelope with adequate postage affixed thereon to insure delivery.

This the 5th day of January, 1981.

JOHN RICHARD YOUNG
Attorney for Petitioner